DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB−2215/P2dn
MGD:lmk:ch

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Ron:

This version of the bill differs from the version approved by the Joint Legislative Council's Special Committee on Sexually Violent Person Commitments, but the differences are non−substantive. In addition, please note the following:

1. Sections 48.396 (6), 48.78 (2) (e), 48.981 (7) (a) 8s., 51.30 (3) (bm) and (4) (b) 8s., 118.125 (2) (ck), 146.82 (2) (cm), 938.396 (10), and 938.78 (2) (e) specify that information that each of those provisions makes available may be disclosed "for any purpose consistent with any proceeding under ch. 980." Does that mean that the information can be released to the general public, given that public protection is one of the purposes of ch. 980 proceedings? If not, what criteria would a court use in determining the appropriateness of a particular disclosure?

2. Section 51.375 (2) (b) would permit public inspection of the results of a lie detector test if they become part of the court record. Was that the Committee's intent?

3. It is unclear how a person would escape from supervised release under s. 946.42 (3m) (b), given that "escape" is defined to mean "to leave in any manner without lawful permission or authority."

4. Instead of defining "act of sexual violence" in s. 980.01 (1b), it would make more sense to replace references to that term in the statutes with "sexually violent offense." For example, s. 980.01 (2) should be amended as follows:

> "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to ~~engage in acts of sexual violence~~ commit sexually violent offenses.

This would require the reader to turn to only one definition to determine the meaning of these provisions (as opposed to two if the new definition is created). In addition, it would allow for the definition of "act of sexual violence" in s. 980.11 to be eliminated.

5. There are several problems with the changes being made to s. 980.015 (2) (a). First, with the phrase "sentence of" being inserted before "imprisonment," this provision might be construed to require the agency with jurisdiction to provide notice with respect to people approaching the end of parole or a term of extended supervision. Is that the Committee's intent? (If so, that would be consistent with the approach taken

in s. 980.015 (2) (c) and (d), but it would require many more notices than those two provisions would.)

Second, the use of the phrase "term of confinement in prison that was imposed" may make it difficult for the state to take advantage of *State v. Parrish*, 2002 WI App 263, 258 Wis. 2d 521, with respect to a person confined for violating a condition of extended supervision. Time served upon revocation of extended supervision is not part of the "term of confinement in prison that was imposed." Therefore, the state might not receive notice about the person's impending re–release. (On the other hand, the person might still be covered under the imprisonment clause, depending on what the Committee's intent was for that clause.) Moreover, the "continuous term of incarceration" language may make the "term of confinement in prison" clause redundant.

Third, in contrast to the approach approved in *State v. Wolfe*, 2001 WI App 136, 246 Wis. 2d 233, the "continuous term of incarceration" language appears to require the agency with jurisdiction to wait until 90 days before the end of the dispositional order (or criminal sentence) that ends last, even if an earlier–expiring order was imposed for a sexually violent offense. Was that the Committee's intent with respect to cases like *Wolfe*? Or does the agency provide notice at the end of the disposition relating to the sexually violent offense (as in *Wolfe*)? Or at either time?

Fourth, because the definition of "incarceration" includes placements under chs. 48 and 938, this provision makes s. 980.015 (2) (b) redundant.

6. It is unclear what is meant by "in custody under a sentence" in s. 980.02 (1) (b) 3. Under current law, a person on parole or extended supervision is in the custody of DOC. Is this provision intended to allow a district attorney for a county to file a petition with respect to a person on parole or extended supervision who is in that county for any period of time?

7. Like current s. 980.02 (1) (b) 2. and (4) (am) and (b), s. 980.02 (1) (b) 3. (which the bill creates) uses the term "commitment order" without specifically referring to s. 971.17. Should it? (Note that, elsewhere in ch. 980, "commitment order" refers to a commitment under ch. 980.)

8. How does s. 980.02 (1m) apply to a person who is released to parole or extended supervision? Must the state file the petition before the person is released? Or may it file it at any time before parole or extended supervision ends?

9. Arguably, the repeal of s. 980.02 (2) (ag) allows the state to file a petition with respect to a person on probation. Was that the Committee's intent?

10. It is unclear whether, under s. 980.03 (5), an expert who relies on tests conducted by another expert would ever be permitted to testify. (If that person may testify, the bill would need to make clear that a party cannot avoid the disclosure requirements by having one expert conduct the tests and another testify based on the test results.)

11. Is the court's expert payable in the same way as an expert appointed under s. 980.031 (3)? In addition, s. 980.031 (1) appears to preclude the court from appointing its own expert once the person has been committed. Was that the Committee's intent?

12. Sections 971.22 and 971.225, on which s. 980.034 (3) and (4) are based, is poorly drafted. I have made some minor changes to those provisions, but this would be a much better way of structuring them:

> **(3)** If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall do one of the following:
>
> (a) Order that the trial be held in any county where an impartial trial can be had. The judge who orders a change in the place of trial under this paragraph shall preside at the trial. Preliminary matters before trial may be conducted in either county at the discretion of the court.
>
> (b) Order the selection of a jury from another county, but only if the court will sequester the jurors during the trial and only if the estimated cost to the county of using the procedure under this paragraph is less than the estimated cost to the county of using the procedure under par. (a). A court that proceeds under this paragraph shall follow the procedure under par. (a) until the jury is chosen in the 2nd county. The proceedings shall then return to the original county using the jurors selected in the 2nd county. The original county shall reimburse the 2nd county for all applicable costs under s. 814.22.
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> **(4)** The court may act under this section only once per case.

If you would like me to revise those provisions in this manner, please let me know. If you do not, there are other changes that still need to be made to achieve the Committee's objectives. First, the sentence beginning with "Only one change" in sub. (3) needs to be moved. Otherwise, a court could change venue to a 2nd county and then pick a jury from a 3rd. Second, sub. (4) (a) 2. needs to be rewritten. This provision should refer to sub. (3) instead of sub. (1), since the requirement for a change of venue is described more specifically in sub. (3).

13. It is not clear why "psychological test, instrument, experiment, or comparison" is listed in s. 980.036 (2) (h) and (3) (d). Wouldn't that be considered part of a "mental examination?" (Note that the provisions in current law on which these provisions are based (namely, s. 971.23 (1) (e) and (2) (am)) do not use the word "psychological.") In addition, what type of "scientific" procedure would be undertaken that is not part of a physical or mental examination?

14. Section 980.036 (6) provides for taking the deposition of a witness under s. 967.04 (2) to (6) at the court's direction under certain circumstances. But s. 980.036 (6) does not refer to s. 967.04 (1), which allows the court to order a witness to produce records and other objects at the deposition. Was this omission intended? Also, who is the "party at whose instance [the] deposition is to be taken" under s. 967.04 (2)? Finally, if a person deposed under s. 967.04 is in custody, s. 967.04 (4) (b) requires the county to pay the costs of bringing the person to the deposition. That may make sense when the deposition precedes a criminal trial, but not when the deposition precedes a ch. 980 trial, because the person who is the subject of the ch. 980 proceeding will almost always be in the state's custody. (I realize that s. 980.036 (6) replicates s. 971.23 (6) –– and the problems that statute contains — but I thought I should alert you to these issues.)

15. Section 980.038 (1) indicates that motions challenging the timeliness of a petitions are still appropriate, notwithstanding s. 980.038 (5). But what is the remedy if such a motion is granted?

16. Section 980.038 (4) indicates that ss. 809.30 and 809.40 apply to ch. 980 proceedings, but it is not clear how both of them can apply. In view of the change to s. 809.30 (1) (c), perhaps only s. 809.30 applies? If so, there are a number of other changes that need to be made to that section — such as the title, the definitions of "person" and "prosecutor," and s. 809.30 (2) (a), to name a few.

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